MOTION FILED

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1384

CLAY COMMUNICATIONS, INC., *Petitioner*

v.

JAMES M. SPROUSE, *Respondent*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae American Newspaper Publishers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. Although the attorneys for the Petitioner have consented to the ANPA's filing of a brief amicus curiae, the ANPA has been advised that the Respondent will not grant his consent.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Vir-

ginia. Its membership consists of more than 1130 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Charleston Daily Mail, Petitioner's newspaper involved in this proceeding, and fifteen other daily newspapers published in various parts of the State of West Virginia hold membership in the ANPA.

Through a brief amicus curiae submitted in support of the appeal of Clay Communications, Inc. below, the ANPA urged the West Virginia Supreme Court of Appeals to reverse the judgment entered by the Circuit Court of Fayette County, West Virginia. The Association argued that the Circuit Court had erred by denying a directed verdict for the defendant under the rule of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). At the time of the alleged libel, the plaintiff was an actively campaigning candidate for the Office of Governor of the State of West Virginia. As such, he was clearly and concededly a public figure which permitted the defendant below to invoke the constitutional privilege accorded it by the rule enunciated in *New York Times* and as extended by *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). Not only did the West Virginia Supreme Court of Appeals refuse to find such error, but also that court, in upholding the trial court judgment, misconstrued the meaning of *Curtis* and totally disregarded the "actual malice" standard required by *New York Times* and its progeny.

The opinion of the Supreme Court of Appeals creates a new test for "actual malice" utilizing

exactly those factors eliminated by the *New York Times* line of cases from consideration in newspaper libel cases. While paying lip service to the *New York Times* standard, the West Virginia court has actually held that the publication of misleading words in headlines, which the court conceded were not false statements of fact, motivated by ill will on the part of the Daily Mail, was sufficient to establish a libelous publication.

As this Court has indicated, one of the most important functions of a free press is to inform an electorate at the earliest possible time of all matters coming to its attention relating to the character and competence of a candidate for high public office and his fitness to hold that office. If, in exercising its editorial judgment as to how best to bring a candidate's activities to the public's attention, a newspaper were to be forced to adhere to the standards adopted by the West Virginia court, this would most certainly have an inhibiting, indeed "chilling", effect upon the editorial tenacity and investigative reporting of all newspapers, including members of the ANPA, in performing one of the most important functions of a truly free press. Accordingly, the members of ANPA, all of whom cherish their right and their duty to inform the public on political matters, have a significant and peculiar interest in making their views known to this Court.

WHEREFORE, the American Newspaper Publishers Association requests this Court to grant this motion

and permit it to file the Brief Amicus Curiae attached hereto.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae
American Newspaper
Publishers Association

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BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Petitioner's, Clay Communications, Inc., Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief, the ANPA and its member newspapers have a significant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged. The opinion of the West Virginia Supreme Court of Appeals is clearly at odds with the constitutional privilege accorded to the press and

represents an extreme deviation and departure from the rulings of this Court since *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). Should the West Virginia court's opinion be allowed to stand, it would become a precedent most seriously affecting all of the ANPA member newspapers nationwide. The press must be ever diligent to ferret out and correct unpermitted inroads upon those most cherished freedoms guaranteed by the First Amendment to the Constitution. It is respectfully submitted that this case presents such an unpermitted inroad upon the freedom of the press. For that reason the ANPA desires to present to this Court, for its assistance, the Association's views in respect of the important issues placed before this Court by the Petition for a Writ of Certiorari.

ARGUMENT

At the outset it must be pointed out that the ANPA strongly supports and adopts the position of Petitioner, Clay Communications, Inc. ANPA believes that the Petitioner's brief persuasively and accurately describes the background of this case, delineates the multitudinous errors and misinterpretations contained in the opinion of the West Virginia Supreme Court of Appeals, and forcefully presents the arguments and cases demonstrating the First Amendment protection which should have been accorded the Petitioner in the proceedings below.

The Association wishes to emphasize the grave errors committed by the West Virginia court in ruling on significant issues related to the substantive

law of libel.[1] Although your amicus believes that it is impossible, through an analysis of the West Virginia court's opinion, to reach any understanding as to what the uniform holding of the court was intended to be, analysis of that opinion does clearly indicate the constitutional invalidity of the ultimate result. The ANPA wishes to set forth, for this Court's consideration, the Association's views on the issues involved.

THE MALICE TEST ADOPTED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS IS CONTRARY TO THE STANDARD ENUNCIATED IN NEW YORK TIMES v. SULLIVAN

The fundamental error of the West Virginia Supreme Court of Appeals stems from its attempt to fashion a new "actual malice" test tailored to the factual circumstances of this case. Although that court specifically recited the "actual malice" test enunciated in *New York Times* v. *Sullivan, supra* and acknowledged its applicability to this case, in considering the evidence before it the court completely lost sight of the requirements that there be a *false statement of fact* which was published with knowledge of its falsity or with reckless disregard for its truth or falsity before there can be an actionable libel. *Gertz* v. *Welch,* —— U.S. ——, 41 L.Ed. 2d 789, 805 (1974).

The "actual malice" stated in the New York Times rule cannot be equated with common law malice, and it makes no difference whether or not a libel defendant is actuated toward the plaintiff by ill will or bad motives. *Old Dominion Branch No. 496, Na-*

[1] The case was not considered by a full court. Justice Sprouse disqualified himself for obvious reasons; Justice Haden, also, disqualified himself.

tional Association of Letter Carriers, AFL-CIO v. *Austin*, —— U.S. ——, 41 L.Ed. 2d 745 (1974); *Beckley Newspapers Corp.* v. *Hanks*, 380 U.S. 81 (1967). The West Virginia court, in the instant case, explicitly recognized this principle, stating:

> "In libel actions 'malice' does not connote the mere dislike of one party for another or the intent of one party to injure another. It is acknowledged, for example, that a political campaign necessarily involves intent on the part of one political group to 'injure' opposition candidates by depriving them of elective office." Petitioner's App. A at 6a-7a.

Nevertheless, the court's ultimate decision can only be understood as holding that where a newspaper intentionally, out of a desire to injure a political candidate, uses misleading words in its headlines, the "actual malice" test is satisfied, even though neither the words nor the headlines are false statements of fact, as the West Virginia court admitted: "[T]he case *sub judice* . . . primarily involves the deliberate use of misleading words in oversized headlines *rather than outright false statements.* Petitioner's App. A at 7a. (emphasis supplied).

Even if the headlines were "misleading," or even "intentionally misleading," there is no way in which that term can be equated with the knowing or reckless publication of a falsehood. Only by reverting to a consideration of factors falling within the ambit of common law malice and through a misinterpretation of *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), was the West Virginia court able to discern for itself that *New York Times* malice had been shown.

Moreover, regardless of what test may be appropriate for determining whether headlines may be considered separately from their accompanying articles, the manner in which the West Virginia court applied the test it chose will not withstand constitutional scrutiny. Your amicus does not believe that it is necessary in this case to determine whether or not headlines may ever be considered separately from the accompanying stories, since the evidence in this case clearly required that both headlines and articles be considered together.[2]

In holding that the headlines could be considered separately the West Virginia court stated:

> "However, where oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headlines may be considered separately with regard to whether a known falsehood was published."
>
> Petitioner's App. A at 15a-16a.

This very statement of the rule adopted by the West Virginia court is contrary to the strictures of *New York Times* v. *Sullivan, supra.* Whether or not "the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to

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[2] It should be noted that at the trial level the jury was specifically instructed to consider both the headlines and the articles in determining whether the "articles" were libelous. Plaintiff's Instruction 8B (R. ——).

create a false impression" is entirely irrelevant to a search for the presence of "actual malice." A "false impression" allegedly communicated by headlines cannot be so easily elevated to the status of a known false statement of fact. Headlines serve the purpose of providing the reader with an abbreviated representation of the contents of the accompanying story. As the West Virginia court itself acknowledged there is an "ability of different people to draw varying inferences from observation of the same set of facts." Petitioner's App. A at 21a. When headlines are composed, necessarily the composer must draw an opinion as to what the story means and attempt to communicate that to the reader. At most, the headlines at issue reflected such an opinion, and, as this Court has stated, there is no such thing as a false opinion. *Gertz* v. *Welch, supra* at 805.

At various points in its opinion the West Virginia court stated that the headlines led to a "false conclusion" or were "unsupported by the body of the story." Yet at the conclusion of section I of the opinion, the court spoke of "the difference between the fair implication of the headlines as opposed to the *supporting factual recitation* of the stories . . ." (emphasis supplied). Petitioner's App. A at 26a-27a. The court constantly implies that the headlines were "unsupported" but is never able to demonstrate the manner in which the evidence showed such lack of support. The court's best effort in this regard relates to the headline containing the words "dummy firm." Concerning those words, the court concluded that the implication was that Sprouse was involved in a fraudulent transaction. That is a possible inference; just as likely, however, is the inference that the company

was little more than a "corporate shell," a characterization which accorded with the Daily Mail's knowledge and the uncontested facts and which would be amply protected by constitutional privilege. *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970). Moreover, the court entirely ignored the fact that "dummy firm" was a paraphrase of Moore's allegation in the accompanying story that the company was a "dummy corporation;" the court failed to comment as to how this failed to "support" the headline.

The West Virginia court held that the stories were true and accurately represented the facts which had come to the attention of the Daily Mail's reporters and editors. Nevertheless, the West Virginia court stated that in its view the newspaper "intentionally" attempted to "impugn" the character and integrity of Sprouse through the publication of those stories with alleged "misleading" headlines, and the court found that actual malice had been shown. This Court has made it abundantly clear that the press must remain unfettered with regard to its choice of materials to be published and to its editorial policy. *Miami Herald Publishing Co.* v. *Tornillo*, —— U.S. ——, 41 L.Ed. 2d 730, 741 (1974), and this is especially important in connection with political affairs. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971).

The primary purpose of headlines is to attract attention, and to that end they may often be sensationalized and abound in hyperbole. Neither of these attributes is sufficient to demonstrate actual malice, *Greenbelt Cooperative Publishing Ass'n* v. *Bresler, supra* at 15. Had the headlines, which the West Virginia court found objectionable, been en-

tirely disconnected from their accompanying stories and, accordingly, represented false statements of fact, then a different case might have been presented. Here, however, where the headlines did reflect the content of the stories and did represent opinions, there is no constitutionally permissible method by which an actionable libel can be found to have existed. If newspapers were required to print headlines, and even articles, in such a way that *all* readers must necessarily draw nondefamatory conclusions, the presses would be forced to a standstill. Such is not the law. This nation and this Court are committed to the principle that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan, supra* at 701.

Even if this Court should find factual error or a defamatory statement in the allegedly libelous publications, this will not suffice "to remove the constitutional shield from criticism of official conduct." *New York Times* v. *Sullivan, supra,* at 273, and, a fortiori, it will not suffice where the criticism relates to the conduct of a person campaigning for high public office. This Court should not permit the press of West Virginia to be intimidated by the failure of the court below to accord to the Petitioner its constitutional protection since:

> "* * * The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of

all restraints upon misgovernment, * * * ". *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

THE PROPOSITION THAT THE PRESS MUST ACT AS A NEUTRAL CONDUIT OF INFORMATION IS INIMICAL TO THE FIRST AMENDMENT

As this Court so recently stated in *Miami Herald Publishing Co.* v. *Tornillo*, —— U.S. ——, 41 L.Ed. 2d 730, 742 (1974):

> "A newspaper is more than a passive receptable or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment."

Despite the clarity with which this Court has so often stated this proposition which forms the foundation for an understanding of freedom of the press, it is obvious that once again, it is necessary for this Court to reaffirm that principle to which state courts find it difficult to adhere.

As your amicus has indicated previously, the formulation of the actual malice test created by the West Virginia court does not require the knowing or reckless publication of a falsehood. Rather, the West Virginia court has adopted a two-tier test: ". . . once an overall plan or scheme to injure has been established, an unreasonable deviation between headlines and the remainder of the presentation is in and of itself evidence of actual malice . . ." Petitioner's App. A at 5a. Under the test adopted by that court,

a libel plaintiff need not even show the publication of a falsehood. All he need do is demonstrate: 1) that the published material was misleading to the extent that it might lead the reader to a false conclusion, and 2) that the newspaper published such material intentionally (i.e., with common law malice) in connection with a "plan or scheme" to disparage the plaintiff. Such an astonishing departure from *New York Times* demands correction.

The West Virginia court contends that this test is permissible because this Court's decision in *Curtis Publishing Co.* v. *Butts, supra,* sustained recovery "partially because of the publisher's personal motives for printing the libel." Your amicus submits that, in the manner in which applied by the West Virginia court, this interpretation is directly contrary to the import of this Court's decision. To accept the West Virginia court's interpretation requires the concession that this Court abandoned the New York Times rule in *Curtis.* Both *Curtis* itself and subsequent cases indicate this Court's continuing and uninterrupted dedication to the constitutional standard established in *New York Times.*

In *Curtis,* it is true that this Court was quite concerned with the fact that the publisher's personal motives had led to the decision to engage in "sophisticated muckraking." It was not because of the presence of those motives, however, that this Court found actual malice. Rather, those motives had to be considered with regard to whether or not the publisher had published the article with reckless disregard for the truth or falsity of that which was con-

tained in the article. The personal motives provided additional evidence that the publisher had failed to properly investigate the matters with which the article was concerned.

In the instant case, a reasonable investigation was made by the employees of the Daily Mail, especially in light of the fact that the articles were "hot news" relating to an imminent election, and that the court below found no false statements of fact in the articles published.

The West Virginia court emphasizes that the Daily Mail did not publish the stories "exclusively as a news-gathering agency," that it departed from "an attempt to report the news objectively," that it "abdicated its traditional role of fairly reporting the news." As this Court has so often acknowledged, no such role or duty has ever existed in regard to the press. In *Tornillo* this Court unanimously rejected the proposition that the press is required to provide a balanced presentation of news.

A basic premise underlying the concepts of free speech and free press is that citizens will disagree as to the merits of issues and individuals, and that only through open and robust debate may the populace be fully informed. In communicating the information which the citizens require in order to form an opinion as to relative merits, it is inevitable that sides will be taken and that personal predelictions will become evident. Were the position of the West Virginia court to be accepted, the flow of information would stagnate and freedom of speech and press would become a thing of the past.

Respondent Sprouse cast himself into the public limelight as a candidate for high office. He thus exposed himself to searching inquiry by the press relating to all aspects of his fitness for office. It is to be noted that he threw down the gauntlet relating to his personal wealth and holdings and that the Daily Mail accepted his challenge. If there were inaccuracies in the publications, Respondent's only remedy was public debate on those items and not a cause of action for libel.

A NEWSPAPER HAS NO LEGAL DUTY TO ASSESS THE TRUTH OR FALSITY OF THE STATEMENTS OF A POLITICAL CANDIDATE

In holding that petitioner-defendant's instruction number 7 to the jury was properly denied, the West Virginia court held that a newspaper may be held liable in a libel action if it accurately publishes the statements of a political candidate when the newspaper knew such statements to be false or published them with reckless disregard for their truth or falsity. Although your amicus believes that the West Virginia Court erred initially in finding that the Daily Mail published the quotations of Arch A. Moore with knowledge of their falsity (there having been no evidence to demonstrate how the Daily Mail was at all aware or unaware of the accuracy of Moore's statements), the ANPA is deeply concerned that acceptance of the standard proposed by the West Virginia court would greatly curtail political and investigative reporting, and, more importantly, that the standard proposed is clearly unconstitutional.

The West Virginia court cites *Greenbelt Cooperative Publishing Ass'n.* v. *Bresler, supra,* in support of this proposition. Yet that decision is directly contrary to such a proposition. There this Court made it clear that a newspaper may repeat, and even paraphrase, statements made in regard to a political and public issue without liability. Moreover, that decision held that even where the statements repeated might be misleading to the reader, such was not sufficient to surmount the boundaries of constitutional privilege.

In *Greenbelt,* this Court was presented with quotes and paraphrases. In the instant case the Daily Mail quoted accurately the statements made by Arch Moore. Regardless of the content or implications of those quotations, the Daily Mail's reporting of them was clearly privileged. Even had the Daily Mail had reason to believe that Moore's accusations were false, it would have had no duty to so state as long as it merely quoted Moore's statement. As this Court has often recognized, political campaigns frequently give rise to colloquy which is vituperative, viscious and even false. But to impose liability on the press for accurately reporting the same would vitiate and destroy the role of a free press in our society.

Even if the press is working in conjunction with the political candidate making the accusations, or "closely coordinated" as the West Virginia court found, to attempt to restrict the press by stating that it may not publish any article which it has reason to believe is false, even though the article consists of nothing more than an accurate report of the statements of a political candidate, is to entirely negate

the purposes of the First Amendment. Is the press to be required to check the validity of every comment of a political figure? Surely not! Only by exposing statements in the press does it become possible for those who doubt the validity of such statements to come forward and rebut them. This is precisely the purpose which a free press was intended to serve.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945). The ability of the press so to disseminate would be drastically curtailed were the West Virginia court's test to be adopted.

CONCLUSION

Your amicus has attempted to elucidate for this Court the significant First Amendment issues underlying the West Virginia court's opinion. The constitutional infirmity of that court's resolution of those issues is evident. The ANPA recognizes, however, that this Court has the additional responsibility of reviewing the evidence as a whole.

Your amicus submits that a review of the evidence, in and of itself, reveals the clear error of the West Virginia court. Although some of the words contained in the allegedly libelous headlines were subject to varying interpretations, none of those headlines even approached the point at which the privilege of fair comment might be breached, and, more importantly, none of them contained a false statement of fact.

For the reasons stated herein and for the reasons advanced by Clay Communications, Inc., it is respectfully urged that the Petition for a Writ of Certiorari to the West Virginia Supreme Court of Appeals be granted.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae
American Newspaper
Publishers Association